

## **BCSE Comments on Proposed Regulations Related to the Implementation Guidance for the Domestic Content Bonus Credit Under the Inflation Reduction Act**

July 15, 2024

Thank you for the opportunity for the Business Council for Sustainable Energy (BCSE) to provide its views in response to the release of updated guidance on implementation of the Domestic Content Bonus Credit under the Inflation Reduction Act (IRA), I.R.S. Notice 2024-41 (May 16, 2024, *rev.* May 24, 2024).

Under Notice 2024-41, the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS) modified the existing safe harbor to provide a new elective safe harbor for determining the Domestic Content Bonus Credit amounts. Specifically, this updates the previous guidance released on May 12, 2023, which provided rules to determine qualification for the Domestic Content Bonus Credit amounts and its related record-keeping and certification requirements.

BCSE appreciated the modification to the existing safe harbor under Table 2 to include hydropower and pumped hydropower storage facilities, as well as the updates to the existing safe harbor to allow taxpayers to elect to use the classifications of components and cost percentages, in lieu of direct costs of the manufacturer, to determine if the adjusted percentage rule is satisfied. However, BCSE recommends further actions that should be taken as well as requests clarification on several topics, as noted below. As such, BCSE would like to acknowledge the submissions made by the American Biogas Council, the American Clean Power Association, the National Hydropower Association, Reworld, and the Solar Energy Industries Association, which provide more detailed views and recommendations on these topics.

### ***Implementation of Domestic Content Bonus Credit Requirements***

Under the IRA, a domestic content bonus credit is available for certain applicable Production Credits for renewable electricity (§§ 45, 45Y) and Investment Credits for renewable energy (§§ 48, 48E).

It applies to facilities or projects built using the required amounts of domestically produced steel or iron and manufactured products. When the domestic content requirements are met, Production Tax Credit (PTC) facilities receive a 10 percent bonus, and Investment Tax Credit (ITC) projects receive up to a 10-percentage point bonus.

Importantly, starting in 2024, for tax-exempt entities seeking to utilize elective pay, the domestic content requirement can also result in a reduction of the applicable credit amount (for sections 45, 45Y, 48, and 48E) if it is not met.<sup>1</sup>

Specifically, if the project does not meet domestic content requirements, an otherwise eligible project will only receive 90 percent of the direct payment if construction begins during calendar year 2024; and would risk losing the entire tax credit for projects beginning construction after 2025. This could put state and local governments and other applicable entities at a significant disadvantage as they will be required to comply with domestic

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<sup>1</sup> Please see: <https://www.irs.gov/pub/irs-drop/n-23-38.pdf>



content requirements or risk losing access to the credits altogether by 2026, even though the credits might be available to claim for projects that begin construction until the end of 2032.

This scenario would not apply to taxpayers who are not classified as applicable entities because they would only lose the bonus credit associated with domestic content and would still be able to claim the base or the adder credit for the entire duration of the credit.

Furthermore, a taxpayer reporting a domestic content bonus credit amount for meeting the Domestic Content Requirement must meet the general recordkeeping requirements under §6001 in order to substantiate that the Domestic Content Requirement has been met. Treasury and the IRS have acknowledged in Notice 2024-41 that obtaining a manufacturer's direct costs of manufacturing may require the taxpayer to gather cost data from multiple suppliers and manufacturers, including foreign manufacturers, and may present challenges for substantiation and verification.

BCSE supports the intent of the IRA law regarding improving domestic manufacturing and enhancing the security of critical supply chains. BCSE members seek clear guidance in a timely manner that will allow for efficient implementation, and that allows applicable entities, like state and local governments, to utilize the tax credit regime.

### ***Modifications to Production Costs Rule***

In forthcoming proposed rules or revised guidance, Treasury and the IRS should modify the Production Costs rule applicable to all Applicable Project Components (APCs) and Manufactured Product Components (MPCs) under any existing or future construct for the domestic content bonus credit. Under current guidance, a taxpayer may only include "Production" Assigned Cost Percentages in Table 1 of Notice 2024-41, or "direct labor costs" under Notice 2023-38, when calculating the Adjusted Percentage if every single MPC of the associated APC is produced domestically.

The domestic content bonus credit provisions of the IRA contain no mention of production costs; they refer only to components. IRS has acknowledged this, yet continues to treat this metric as a key indicator to recognizing the full value of American-made products. As written, this serves as a disincentive to investment in domestic manufacturing, and unfairly penalizes American workers.

### ***Expanding Elective Safe Harbor to All Eligible Technologies***

BCSE commends Treasury, the IRS and their partner federal agencies in establishing the new elective safe harbor. It is helpful in eliminating some of the burdensome compliance efforts in gathering sensitive cost data from suppliers. This safe harbor adds a welcome simplification and a degree of certainty in the domestic content calculations. Unfortunately, however, several important clean energy technologies that are eligible for the tax credits under §§45, 45Y, 48, and 48E remain excluded from the safe harbor.



BCSE recommends that Treasury and the IRS consider adding all technologies potentially eligible for tax credits under §45, §45Y, §48, or §48E, including but not limited to “qualified biogas properties” (“renewable natural gas” producers), facilities utilizing qualified energy resources such as municipal solid waste (“waste -to-energy”) and biomass to generate electricity, to Table 1 as projects eligible for the new election safe harbor. These are widely recognized as technologies that help mitigate climate change. Also, some of these solutions, such as biogas facilities creating renewable natural gas, face the loss of the section 48 tax credit at the end of the year, making the lack of any specific guidance for securing the domestic content bonus even more difficult for developers trying to commence construction by the end of the year and include the necessary U.S.-made components in the project.

In addition, Treasury and IRS should allow the Domestic Content Percentage to be based on taxpayer cost, or purchase price, as opposed to direct manufacturer costs, which would also include a third-party verification process. While not optimal, this would address some of the challenges with the existing implementation rules.

Further, these issues are especially critical to the clean energy technologies most utilized by local governments (such as waste-to-energy, renewable natural gas, anaerobic digestion, biomass to generate electricity, among others). Given local governments have an obligation to manage solid waste, facilities that process municipal solid waste constitute critical infrastructure for local governments across the United States. Local government’s risk of losing access to the credits altogether if they do not comply with the domestic content requirements should necessitate prioritizing these technologies for inclusion on Table 1.

### ***Modifications to Notice 2024-41, Table 1<sup>2</sup>***

In support of the submission provided by the Solar Energy Industries Association (SEIA), BCSE recommends the addition of a new row to Table 1(1) for “Manufactured Roof Mounting Systems” and the addition of two new columns and a new row to Table 1(1) for “Building-integrated PV.”

Further, in support of the submission provided by the American Biogas Council (ABC), to address the omission of Qualified Biogas Property, specifically we recommend the addition of a new section to Table 1, including the component definitions in the EPA Biogas System Operator Guidebook EPA 430-B-20-003 establishing the biogas facility the manufactured product and the manufactured product components as “Waste reception and storage”, “Digester/bioreactor”, “Effluent storage”, “Biogas processing”, “Equipment for biogas productive use”, “Feedstock/Waste pretreatment”, “Solids separation”, and “Nutrient and water recovery.”

In addition, BCSE urges the IRS to make similar modifications to aspects of Table 1 to accommodate new or emerging technologies. Such flexibility is especially important for less mature systems and industries because they may require additional support through tax incentives to secure customers.

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<sup>2</sup> I.R.S. Notice 2024-41, at 15-17.



### ***Modifications to Notice 2024-41, Table 2***

Notice 2024-41 incorporated a safe harbor Table 2 for hydropower and pumped storage that is non exhaustive. BCSE appreciates the attempt to provide needed clarity for hydropower and pumped storage, however due to the level of granularity required, the non exhaustive list of steel/iron and manufactured products, and the continued use of subcomponents, the safe harbor Table 2 provided in Notice 2024-41 is unimplementable for the hydropower and pumped storage industries.

To provide the needed clarity for the hydropower and pumped storage sector, BCSE respectfully requests that Treasury and the IRS adopt the safe harbor Table 1 offered by the National Hydropower Association dated July 15th, 2024.

As hydropower and pumped storage components are customized to the site and are long lead in nature, upgraded guidance from Treasury and this IRS is needed immediately.

### ***Clarifications Requested to Terms***

Table 1 incorporates several broad and potentially vague terms, many of which appear in domestic content-related guidance for the first time. This is especially true for terms used to describe rooftop systems, which were omitted from Notice 2023-38. The same terms can have significantly different meanings depending on whether they are used in the context of ground-mount or rooftop systems, as discussed in the comments submitted by SEIA.

For example, terms used to describe MPCs of the Battery Pack in Table 1(3) are potentially vague and would benefit from separate clarifications for Grid-scale Battery Electric Storage Systems (BESS) and Distributed BESS. Consistent with SEIA's comments BCSE recommends that IRS issue a revised Notice 2024-41 as soon as possible to provide additional definitions and clarifications applicable to Table 1(1) ("SOLAR PV TABLE") and Table 1(3) ("BATTERY ELECTRIC STORAGE SYSTEM TABLE").

### ***Affirm the Option to Utilize Notice 2023-38 Guidance and Requested Updates***

Taxpayers may continue to rely on Notice 2023-38 for projects of which construction begins before the date that is 90 days after the publication of forthcoming proposed regulations on the domestic content bonus credit.<sup>3</sup> Withdrawal or material modifications to Notice 2023-38 would potentially disrupt or devalue substantial investments in future projects, which may not begin construction until well after the current effective period.

The uncertainty introduced by continued delay in promulgating final rules on domestic content has left some taxpayers and manufacturers - who must make investment decisions many years in advance - with no choice but to rely on guidance that has made been available first. BCSE requests that relevant parts of Notice 2023-38 (*i.e.*, the direct cost approach and Table 2) be retained as an elective option for taxpayers to obtain the domestic content bonus credit even after proposed rules are finalized.

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<sup>3</sup> I.R.S. Notice 2023-38, at 2; I.R.S. Notice 2024-41, at 2.



### ***Provide Incentives for U.S. Solar Wafer Production***

Treasury and the IRS should continue to explore options in support of the IRA's goal of incentivizing U.S. solar manufacturing, including solar wafer production. BCSE supports the comment submissions made by SEIA and the American Clean Power Association requesting that forthcoming proposed regulations and further guidance on the domestic content bonus credit incorporate policy changes to better achieve this objective. Please refer to their respective comments for additional details.

Thank you for the opportunity to share the views of the Business Council for Sustainable Energy. Please do not hesitate to contact BCSE President, [Lisa Jacobson](#) with any questions.

### **About the Business Council for Sustainable Energy**

*The Business Council for Sustainable Energy (BCSE) is a coalition of companies and trade associations that deploy clean energy and decarbonization solutions, with a sector focus on energy efficiency, natural gas, and renewable energy. Members include investor-owned utilities, public power, independent power producers, project developers, technology providers, equipment manufacturers, environmental and energy market service companies, and more. The coalition advocates at the federal level for policies that advance the deployment of a broad portfolio of clean energy technologies. Established in 1992, BCSE has also been an accredited observer of the UNFCCC climate negotiations for more than 30 years.*

*BCSE collaborates frequently with its small business division, the Clean Energy Business Network (CEBN), with convenes a network of more than 7,000 members across all 50 states. Collectively, BCSE and CEBN mobilize the full breadth of the clean energy economy, from innovators and small businesses to industry leaders and the trade associations that represent them.*